



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL DIVISION**

Judicial Review Cause Number 7 of 2020

BETWEEN:

**THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT
THE CLERK OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT
THE MINISTER OF FINANCE.....3RD RESPONDENT
EX-PARTE
MM & 18 OTHERS.....APPLICANTS**

CORAM: C MANDALA: ASSISTANT REGISTRAR

H Soko, C Makoko, J Liabunya & I Maluza: Counsel for Applicants of Women Lawyers Association
O Chuma, P Masanjala, I Chirwa, & L Bonomali: Attorney General's Chambers for the Defendants
Dzikanyanga: Court Clerk

ASSESSMENT OF COSTS

C MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of costs pursuant to a judgment delivered on 13th August 2020 by the Honorable Justice KK Nyirenda. The Applicants filed a Bill of Costs on 24th May 2021 proposing a total sum of K215,628,102.00 to be awarded as costs. Counsel for the Defendant did not file written objections to the Bill of Taxation but made oral objections on the day of hearing. The hearing on assessment of costs was conducted on 9th June 2021, and this ruling stems from that hearing.

THE LAW

One of the powers and functions of registrars is to assess costs. Order 25 rule 1(o) of the *Courts (High Court) (Civil Procedure) Rules* of 2017. Costs are to be assessed on a standard or indemnity basis and the court will not allow costs that are unreasonably in their incurrence or amount. Order 31 rule 4 of the *Courts (High Court) (Civil Procedure) Rules* of 2017. In assessing costs, according to Order 31 rule of *the Courts (High Court) (Civil Procedure) Rules* of 2017, the Court will consider the following circumstances in assessing costs:

- 5.—(1) *The Court shall have regard to all the circumstances in deciding whether costs were*
- (a) if it is assessing costs on the standard basis—*
 - (i) proportionately and reasonably incurred; or*
 - (ii) were proportionate and reasonable in amount, or*
 - (b) if it is assessing costs on the indemnity basis—*
 - (i) unreasonably incurred; or*
 - (ii) unreasonable in amount.*

Additionally,

(3) *The Court shall also have regard to__*

(a) *the conduct of all the parties, including in particular__*

(i) *conduct before, as well as during, the proceedings; and*

(ii) *the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;*

(b) *the amount or value of any money or property involved;*

(c) *the importance of the matter to all the parties;*

(d) *the particular complexity of the matter or the difficulty or novelty of the questions raised;*

(e) *the skill, effort, specialized knowledge and responsibility involved;*

(f) *the time spent on the case; and*

(g) *the place where and the circumstances in which work or any part of it was done.*

ISSUES

The issues raised for the Court's Determination are:

1. Fee Earners
2. Care and Conduct
3. Instruction Fee

DISCUSSION

1. Fee Earners

The Bill of Costs lists five (5) Counsel of various years of standing at the Malawi bar, namely: Counsel Charlotte Wezi Malonda of 19 years standing at the bar- MK40,000.00/hr, Counsel Hilda Soko of 10 years standing at the bar - MK40,000.00/hr, Counsel Tadala Chinkwezule of 10 years standing at the bar -- MK40,000.00/hr, Counsel Carol Tendai Makoko of 4 years standing at the bar-MK30,000.00/hr, and Counsel Immaculate Maluza of 3 years standing at the bar- MK30,000.00/hr. Counsel for the Respondents argues that most of the documents were prepared by three Counsel only, namely Counsel Soko, Counsel Makoko, and Counsel Maluza. The number of Counsel was increased to five at assessment of compensation. The Judgment on Judicial Review only lists three Counsel on the Coram. Counsel for the Defendant requested that each Counsel should show what they did to entitle them to costs. In Response Counsel for the Applicants stated that they did not include all Counsel who worked on the matter. Due to Covid restrictions, not all Counsel present were seated at the bar and Counsel Chinkwezule and Counsel Dr Malunga had to sit in the gallery. Counsel further averred that there were 18 Applicants with different cases and assigned four (4) applicants to one Counsel was reasonable.

The Registrar has the discretion to determine the number of Counsel to claim costs. The Registrar, in ***Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission*** Constitutional Reference Number 1 of 2019, limited the number of Counsel representing each party to 5. In making her determination, she considered 'the complexity of the matter, the importance of the case to the nation and factors raised by Counsel'. Some other issues raised by Counsel were that '*it was one of the most important cases in the history of Malawi, and a good number of lawyers was needed to scrutinise the volume of documents in the case.*' Although all this was true, the Registrar noted that the receiving party should not incur unnecessary expenses under the guise of national importance and the historic nature of the case.

There are 18 Applicants in this matter, and each one of them is entitled to legal representation. Having five (5) lawyers acting under the Women Lawyers Association was fair in the circumstances. The number of lawyers will be maintained as proposed.

2. General Care and Conduct

The Bill of Costs pegs Care and Conduct at 100%. In opposition, Counsel for the Defendants argues that this case was not complicated, there were no threats as put by Counsel, and information was readily available. Counsel Liabunya for the Applicants responded by stating that Counsel were dealing with 18 traumatised Applicants who had lost businesses and marriages due to the acts of the Defendants and they remained traumatised throughout the case. Additionally, the Applicants were living in fear and the case was novel as this was one of the first cases where the court had to deal with Claims of this nature. Finally, there were security risk associated with handling the case. These factors made the case exceptional, and this warrants the 100% care and conduct.

In ***Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited*** - Personal Injury Cause Number 914 of 2016, the Assistant Registrar discussed Care and Conduct as follows:

‘On this regard, I wish to agree with Counsel representing the receiving party in that the new Rules specifically provide for Care and Conduct albeit not having been stated verbatim. General care and conduct covers the imponderable for which no direct time can be substantiated. It is a percentage mark-up of the costs allowed depending on the difficulty, responsibility, and importance of the case to the client. I believe this is what Order 31 rule 5(3)(d) and (e) covers.’

It is trite that parties are entitled to awards for care and conduct. Although care and conduct is not expressly mentioned in the ***Courts (High Court) (Civil Procedure) Rules***, courts have been making awards for care and conduct: see ***Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission*** - Constitutional Reference Number 1 of 2019 and ***Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited*** - Personal Injury Cause Number 914 of 2016.

The issue to be considered is the percentage to be awarded for care and conduct. The Registrar, in ***Dr Saulos Klaus Chilima & Dr Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission*** Constitutional Reference Number 1 of 2019, awarded 100% for care and conduct because the case was ‘burdensome, difficult and complex’. She cited the case of *Johnson v Reed Corrugated Cases Ltd* [1992] 1 All ER 169 QBD which states:

‘I am advised that the range normal i.e non-exceptional, cases starts at 50% which the registrar regarded, rightly in my view, as an appropriate figure for ‘run of the mill’ cases. The figure increases above 50% so as to reflect a number of possible factors – including the complexity of the case, any particular need for special attention to be paid to it and any additional responsibilities which the solicitor may have undertaken toward the client, and others, depending on the circumstances – but only a small percentage of accident cases results in allowance of over 70%. To justify a figure of 100% or even one closely approaching there must be some factor or combination of factors which mean that the case approaches the exceptional. A figure above 100% would seem to be appropriate only when the individual case, or cases of the particular kind, can properly be regarded as exceptional, and such cases will be rare.’

In the matter of ***The Attorney General v Gift Trapence, Timothy Mtambo, and Malawi Human Rights Defenders Coalition*** Civil Cause Number 566 of 2019, this court pegged care and conduct at 80% and cited the following reasons:

‘The matter at hand lasted a very short period, while the importance of the subject matter is appreciated, maintaining care and conduct at 120% would be excessive.’

In the ***Dr Saulos Klaus Chilima Case***, Care and Conduct was pegged at 100% for a matter that had volumes of documentation, sometimes complex evidence and spanned a period of over a year. In the ***Attorney General v Gift Trapence et al Case***, care and conduct was pegged at 80% for a matter that was as short and non-complex.

This court appreciates the amount of work that had to be put into prosecuting this matter as explained by Counsel. In the ***Dr Saulos Klaus Chilima Case***, Care and Conduct was pegged at 100% for a matter that had volumes of documentation, sometimes complex evidence and spanned a period of over a year. The matter at hand was similarly taxing, was of national importance, and held a determination on fundamental rights as enshrined in the Constitution. This Court will maintain Care and Conduct at 100%.

Further, Counsel for the Defendants further made an objection on care and conduct being applied to every single application as opposed to care and conduct being applied to the total bill. Counsel for the Applicants argued that there is no prescribed format for Bills of Costs and the formats adopted by various Counsel are just a matter of preference. This court will apply care and conduct to the total bill.

3. *Instruction Fee*

The Taxed Bill of Costs pegs instruction fee at the rate of K75,000,000 (seventy-five million kwacha). Counsel for the Defendant argues, in opposition, that the Counsel are from the Women Lawyers Association (WLA) and WLA is not a law firm. Second, instruction fee should come by showing the number of hours that Counsel spent on receiving instruction. The clients are women and children of limited means so it is not expected that these clients will raise K75,000,000.00. Counsel for the Defendant further averred that Counsel came from different legal houses and it's not possible that the Applicants went to different legal houses to give instructions to Counsel. In response, Counsel Makoko for the Applicants averred that this was a delayed objection as WLA being an NGO was already dealt with at the inception. Order 31 rule 10 of the ***Courts (High Court) (Civil Procedure) Rules*** says, 'a legal practitioner or his law firm' and can be understood not necessarily as only entitling a legal house to instruction fee. Counsel Makoko cited SA History Archive Trust v SA Reserve Bank Number 117 of 2019 where it was held that people with limited means can access Courts through NGOs. Instruction fee in that case was upheld for both Counsel in their own right, and the NGO. Finally, Counsel Makoko noted that instruction fee does not require evidence such as time sheets as the production of these does not take away from the fact that Counsel received instructions. Counsel Maluza further submitted that they had demonstrated a clear connection between their expenditures and the proceedings as per ***Dudgeon v United Kingdom*** European Court of Human Rights Article 50 [1983] Series Number 59.

Order 31 rule 10 of the ***Courts (High Court) (Civil Procedure) Rules*** of 2017 provides for instruction fee as follows:

- 10.—(1) *A legal practitioner or his law firm shall be entitled to an instruction fee and not a brief fee where he or his firm have had instructions to act for a party from the commencement of a proceeding to trial.*
- (2) *The Court may allow a legal practitioner or his law firm to be entitled to a single fee.*
- (3) *A legal practitioner or his law firm shall be entitled to a brief fee where he or his firm have instructions from another legal practitioner or firm to appear on behalf of that legal practitioner or firm at trial.*

In ***Ruth Belentino v Hanif Mahommed & General Alliance Insurance Company Limited*** - Personal Injury Cause Number 914 of 2016, the Assistant Registrar opined that an award for instruction fee cannot be disallowed but that the amount claimed was excessive. He reduced the instruction fee from K3,000,000.00 (three million kwacha) to K1,000,000.00 (one million kwacha).

Following from the Ruth Bellentino Case, As is the Case here, this Court believed the instruction fee is excessive. The Court will therefore award K10,000,000.00 (ten million kwacha) as instruction fees to each Counsel. The total instruction fee is therefore reduced to K50,000,000.00.

4. Taxed Bill

This matter was handled by Counsel Charlotte Wezi Malonda of 19 years standing at the bar- MK40,000.00/hr, Counsel Hilda Soko of 10 years standing at the bar - MK40,000.00/hr, Counsel Tadala Chinkwezule of 10 years standing at the bar -- MK40,000.00/hr, Counsel Carol Tendai Makoko of 4 years standing at the bar- MK30,000.00/hr, and Counsel Immaculate Maluza of 3 years standing at the bar- MK30,000.00/hr. The total is therefore K180,000.00.

SUMMARY OF BILL

<u>DETAILS</u>	<u>TAXED AMOUNT (MWK)</u>
Interlocutory Attendances and Court Hearings	K5,040,000.00
Instruction Fee	K50,000,000.00
Part I – Preparatory Work	
<ul style="list-style-type: none"> Conferences <ul style="list-style-type: none"> With Clients With Expert Witnesses 	K5,400, 000.00 K2,700,000.00
<ul style="list-style-type: none"> Court Documents Perused 	K10,350,000.00
<ul style="list-style-type: none"> Court Documents Prepared 	K22,815,000.00
<ul style="list-style-type: none"> Case authorities perused and cited on opinion, Defendants and Claimants skeletal arguments (10 allowed at 1 hour each) & Legislation read and considered 	K7,920,000.00
Part I - Total	K49,185,000.00
Sub Total for Interlocutory Attendances, Instruction Fee and Part I	K104, 225,000.00
Part II - Care and Conduct at 100%	K104, 225,000.00
Part III – Court and oath fees, travelling expenses and waiting time	K2,302,500.00
Disbursements	K500,000.00
Other expenses <ul style="list-style-type: none"> Fees for independent experts: <ul style="list-style-type: none"> Dr Ngcimezile Mweso, MK 320,000/day for 7 days Dr Chioza Bandawe, MK350,000/day for 5 days 	K2,240,000.00 K1,750,000.00
Assessment of Costs	K2,160,000.00

Disbursements on taxation	K31,000.00
Travelling and waiting	K170,000.00
Professional Fees	K217,603,500.00
Value Added Tax (16.5%)	K35,904,577.50
MLS Levy (1%)	K2,176,035.00
TOTAL PAYABLE	K255,684,112.00

DISPOSAL

The Bill of Costs is hereby taxed at **MWK255,684,112.00 (two hundred and fifty five million six hundred and eighty four thousand, one hundred and twelve kwacha).**

Ordered in Chambers on the 6th day of August 2021 at the High Court, Civil Division, Lilongwe.



CM Mandala

ASSISTANT REGISTRAR